SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 15 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1288

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,
Petitioner,

vs.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

KALVIN M. GROVE
PAUL J. CHERNER
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Petitioner

Gunthorp-Warren Printing Company, Chicago • 346-1717

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1288

LIBERTY MUTUAL INSURANCE COMPANY,
A CORPORATION,

Petitioner,

vs.

SANDRA WETZEL, AND MARI ROSS, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE TO BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Although Respondents concede the importance of the significant questions presented by this petition (Opposition pp. 4 and 6), they urge that these issues do not warrant review because of their erroneous assertion that there is no conflict among the decisions of the Courts of Appeals. In light of the obvious conflict in decisions which has been demonstrated in the petition, it is clear that this contention is without merit and that the Court must resolve this inconsistency in the administration of class action suits.

1. Petitioner will not attempt to belabor the Court with its interpretation of its previously cited cases, which clearly demon-

strate the current conflict in the various Circuits. However, the Petitioner feels compelled to comment upon Respondents' unsuccessful effort (Opposition p. 5) to distinguish the significant case of *Air Line Stewards* v. *American Airlines, Inc.*, 490 F. 2d 636 (7th Cir. 1973), *cert. den.* 416 U. S. 993 (1974), which, contrary to Respondents, is clearly apposite to the present case. Thus, in that case the Seventh Circuit concluded that with respect to former employees, "the class actions would, even at the beginning, have had to be maintained under (b)(3)."[1] 490 F. 2d at 643. The Court further commented that since the employers had ended their alleged discriminatory policy, "purely prospective relief against the practice became of little moment. The (b)(3) character of the actions, while always present as to the [former employees] became even more obvious." *Ibid.* The (b)(3) character of this action was similarly obvious, where, throughout the course of this litigation, the District Court was presented with uncontroverted evidence clearly indicating that Petitioner has changed the alleged discriminatory hiring and promotion policies prior to the commencement of the action.[2] Accordingly, the conflict that has resulted from this disparate treatment of these analogous situations should be resolved by this Court, in order to provide for uniform administration of such class actions.

2. Respondents' attempts to obfuscate the important and well-defined questions presented herein, by incorrectly characterizing them as abstract and theoretical and by misconstruing the record, must also fail. The decision below presents a real and significant prejudice to the rights of the Petitioner, as well

1. The District Court in the present case recognized the propriety of excluding former employees from a 23(b)(2) class in its initial class certification order (see petit. p. 4), but subsequently reversed itself and improperly included these individuals in the (b)(2) class.

2. Indeed, the District Court in its last order concerning certification of the class (issued just one month before its decision on the motion for summary judgment) specifically acknowledged, but refused to resolve, the substantial question of the propriety of treating a case in this posture as a (b)(2) action (see petit. p. 4).

as to the rights of absent class members, and, until these issues are resolved, this unjust situation is likely to recur in the substantial number of class action suits filed each year in the federal judicial system. The importance and urgency of resolving these critical questions can only be stated with the utmost emphasis. Petitioner must also mention that the record speaks for itself, and that, contrary to Respondents' allegations, it has urged and not resisted the sending of pre-judgment notice to absent class members. Thus, it is clear that the decision below, based upon an essentially uncontroverted record, has presented significant questions crucial to the federal courts' administration of class action suits and of Rule 23, which should be resolved by this Court.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

KALVIN M. GROVE
PAUL J. CHERNER
LEDERER, FOX AND GROVE
Sears Tower—Suite 7916
233 South Wacker Drive
Chicago, Illinois 60606

ROBERT A. PENNEY
175 Berkeley Street
Boston, Massachusetts 02226

CLEM R. KYLE
717 Liberty Avenue
Pittsburgh, Pennsylvania 15222
Attorneys for Petitioner